U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 03 September 2003

In the Matters of:

COMPAQ COMPUTER CORPORATION,
Employer,

on behalf of

BALAJI KRISHNAN, **BALCA No. 2002-INA-249**
ETA Case No. P2001-MA-01314903

NIRAV VINOD GANDHI, **BALCA No. 2002-INA-250**
ETA Case No. P2002-MA-01316124

TAKAAKI SHINAGAWA, **BALCA No. 2002-INA-251**
ETA Case No. P2002-NH-01317614

ASHISH BHATTARAI, **BALCA No. 2002-INA-252**
ETA Case No. P2002-NH-01317615

BRUNO GOVEAS, **BALCA No. 2002-INA-253**
ETA Case No. 2001-MA-01308807

and

MANAL A. EL-TIGI, **BALCA No. 2002-INA-261**
ETA Case No. 2002-MA-01317612

Aliens.

Appearance: Michael H. Boshnaick, Esquire
Irvine, California

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF RIRs
AND
REMANDING FOR FURTHER PROCESSING

These cases arise from Employer's request for review pursuant to 20 C.F.R. § 66.26 of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the positions of Business Systems Analyst and "Systems/Software Engineer."[1] In these cases, Employer applied for a reduction in recruitment ["RIR"]. The Certifying Officer ("CO") denied RIR in each of the cases, however, because he found that Employer had not adequately responded to his questions about the effect of recent layoffs by Employer. Rather than remanding for a continuation of the application under the basic recruitment scheme, the CO denied labor certification. The CO also denied motions for reconsideration, and the matters were transferred to this Board on appeal. Because of the similarity of the facts and issues raised these cases have been consolidated for decision. *See* 29 C.F.R. § 18.11.

RIR is an alternative to the basic labor certification process in which a CO may reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it has adequately tested the labor market with no success at the prevailing wage and working conditions. 20 C.F.R. § 656.21(i). An RIR must include documentary evidence that within the immediately preceding six months the employer has made good faith efforts to recruit U.S. workers for the job opportunity, at least at the prevailing wage and working conditions, through sources normal to the

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

occupation. 20 C.F.R. § 656.21(i)(1)(i). The RIR must also contain any other information that the employer believes supports the request. 20 C.F.R. § 656.21(i)(1)(ii).

STATEMENT OF THE CASE

BUSINESS SYSTEMS ANALYST POSITION

On April 24, 2001, Compaq Computer Corporation ("Employer") filed an application for labor certification to enable Balaji Krishnan ("Alien") to fill the position of "Business Systems Analyst." (AF 58). A Master's degree or equivalent in computer engineering, electrical engineering or a related field was required. The "equivalent" was listed as being a Bachelor's degree or equivalent and five years of progressively responsible experience in the job offered or related field of software applications. No experience in the job offered was required.

By cover letter dated April 24, 2001, Employer requested RIR. (AF 54). The CO issued a Notice of Findings ("NOF") on April 24, 2002, proposing to deny certification, based upon 20 C.F.R. 656.20(c)(8) which requires that job offers filed on behalf of aliens must clearly show that the job opportunity has been and is clearly open to any qualified U.S. worker. (AF 11). The CO determined that Employer had recently experienced or would experience a reduction in workforce, and therefore it was highly appropriate for Employer to make certain that every effort had been taken in considering individuals who might have been laid off or were about to be laid off for the instant position.

Employer was directed to submit documentation that the job opportunity had not been affected by the reduction in workforce and that none of the employees who were terminated or about to be terminated qualified for the job. Employer was instructed to (1) document that any employees who had been laid off had been considered for the position at hand – the documentation to include the number of layoffs, the specific positions which had been the subject of the layoffs and information regarding why none of the displaced individuals were qualified for the instant position; (2) identify each individual who was laid off from the position for which certification was being sought or similar positions, the number of individuals employed in the same or similar positions as the beneficiary of

the application and the total number of layoffs for this or similar positions. Employer was also directed to explain whether the individuals who were displaced from similar positions were considered for this opening and explain why, if they were considered, they were not hired. If the laid off employees were not considered, Employer was directed to explain why; (3) state whether Employer was currently experiencing a hiring freeze or any other hiring restrictions, or whether any such restrictions were anticipated in the future. If there was no hiring freeze, Employer was directed to state how many vacancies for similar positions there were; (4) state whether the job opportunity at issue had been in any way affected by budget cuts, and if so, how this had affected individuals performing the position or other similar positions; and (5) state the additional efforts made to identify qualified individuals who may have been affected by reductions in other departments within the company.

Employer's counsel submitted a cover letter dated May 28, 2002, enclosing a letter from Employer's Senior Immigration Specialist ("SIS"). (AF 7). Counsel for Employer contended that the enclosed letter set forth in full detail the nature of Employer's recent layoffs and detailed the reason why all U.S. workers who had been laid off were not qualified for the position at issue.

The SIS's letter indicated that in March of 2001, Employer announced its plan to reduce its workforce worldwide by 5,000 workers, with an additional reduction in the amount of 2,000 being planned as a result of lower earnings per share during the first quarter of 2001. Of this total amount, 2,500 positions would be eliminated through attrition, with the remainder being laid off. The SIS noted that the position offered was located in Marlboro, Massachusetts, where a total of 249 employees were laid off from a variety of divisions. Two hundred twenty-four individuals were in divisions other than Information Management. Of the eighteen individuals in the Information Management division, only seven were business systems analysts of various levels. None were in the same position as the one at issue, but three were considered to be similar. All three were considered for the position, but none were found to be qualified. The SIS stated that Employer was currently experiencing a hiring freeze, however it did still hire and recruit for some highly specialized technical positions, and the position at issue herein had not been affected by budget cuts. The SIS advised that

although Employer had an open job posting system, there were no applicants for the instant position.

A Final Determination ("FD") was issued on June 21, 2002, denying certification. (AF 5). Therein, the CO determined that while Employer's letter answered the questions in the NOF, and was responsive to the NOF, it was not complete, and Employer had not met the burden of demonstrating that the requirements for labor certification had been met, "especially after having the benefit of a clear NOF for a guide in formulating evidence." Specifically, the CO found that Employer had focused quite narrowly, limiting its discussion to the specific location and division of the instant position when discussing individuals affected by layoffs, as opposed to employees "similarly employed" as determined by similarity of skills and knowledge required for performance of the job at issue. This included skills and knowledge acquired through related work, which would be transferable. Since the position at issue required no experience in the job offered, with appropriate skills and knowledge attained through a combination of education, training or experience, such an applicant would be able to perform the duties of the position. While Employer had indicated that the position title was a very broad one within the company, the criteria used for consideration of the position was quite narrow. Insufficient information had been submitted and no documentation was provided to support a claim that Employer had made appropriate consideration of laid off U.S. workers for the position. The CO determined that Employer had not shown that the laid off U.S. workers could not perform the main job duties, or that these workers could not perform the duties of the position with a nominal period of on-the-job training.

With respect to the issue of the hiring freeze, the CO noted that Employer stated it currently had one. Employer also stated that it still hires and recruits for some highly specialized technical positions, yet Employer failed to state what positions (including the position for which certification was sought) were affected. Insufficient documentation was submitted to clearly show that a *bona fide* job opportunity, open to U.S. workers, existed. The CO concluded that if a hiring freeze was in effect, Employer would not be able to hire qualified workers referred to them by any source. The CO concluded that since there was no current potential to hire U.S. workers, there was no job opportunity currently open to qualified U.S. workers. Finally, the CO noted that it had requested

information regarding any of Employer's additional efforts to identify qualified individuals who may have been affected by reductions in other departments within the company and to document those efforts. The CO determined that Employer failed to respond to this issue in any way.

By letter dated July 25, 2002, Employer requested reconsideration of the Final Determination. (AF 2). Therein, Employer argued that it had conducted a good faith test of U.S. worker availability. Employer cited the recent memoranda issued by Dale M. Ziegler, Chief of the Division of Foreign Labor Certification for the U.S. Department of Labor, on March 18, 2002, and May 28, 2002, arguing that the CO failed to follow the standard operating procedures set out in those memoranda, and that those standard operating procedures should have been followed herein. If the request for reconsideration was denied, Employer requested that it be allowed to pursue an appeal to the Board of Alien Labor Certification Appeals ("Board" or "BALCA"). On July 30, 2002, the CO denied the request for reconsideration and stated that the application would be forwarded to BALCA for review. (AF 1).

STATEMENT OF THE CASE

SYSTEMS/SOFTWARE ENGINEER POSITIONS

By cover letter dated April 24, 2001, Employer requested RIR for the Systems/Software Engineer position underlying the applications in Case Nos. 2002-INA-250, 251 , 252, 253 and 261. (AF 55-58).[2] The requirements for the job were a Master's Degree in Computer Science or related field. (AF 59) or "Master's Degree or equivalent in Computer Science, an Engineering discipline or related field." (2002-INA-252, AF 29) No experience was required. In March 2002 the CO issued his Notices of Findings ("NOF") proposing to deny Employer's applications for certification. The CO's ground for denial was that the job opportunity had not been and was not clearly open to any qualified U.S. worker, in violation of by 20 C.F.R. 656.20(c). The CO determined that since

[2] Unless otherwise noted, the citations to the record in this section are to Case No. 2002-INA-250 as a representative case file.

Employer had recently experienced or would experience a reduction in workforce, it was highly appropriate for Employer to make certain that every effort had been taken in considering individuals who might have been laid off, or were about to be laid off, for the instant position. The CO observed that it was not clear that such efforts had been made here. (AF 11-12).

Accordingly, the CO requested that Employer document that the job opportunity was open to individuals who had been laid off or would be laid off for positions such as those for which certification was being sought. Specifically, the CO directed employer to:

> A) provide documentation demonstrating that individuals, who may have been laid off or about to be laid off, have been appropriately considered for the position at hand.
>
> B) identify each individual laid off from the position for which certification is sought or similar positions.
>
> C) document whether they are currently experiencing a hiring freeze or any other hiring restriction and whether any type of hiring restriction was anticipated in the future.
>
> D) document if the job opportunity for which certification is sought has been in any way affected by budget cuts.
>
> E) state if there has been additional efforts to identify qualified individuals who may have been affected by reductions in other departments within the company, and if so, to document these efforts.

(AF 12).

In a rebuttal dated March 27, 2002, Employer by counsel submitted a letter from Employer's Senior Immigration Specialist ("SIS"). The letter from Employer's SIS responded to each of the CO's questions raised in the NOF, indicating Employer's plan to reduce its worldwide workforce by 5,000 employees, with an additional reduction by 2,000 planned for the future. The CO, however, while finding Employer's rebuttal responsive, did not find that Employer had sufficiently corrected the deficiencies noted in the NOF. Specifically, in a Final Determination dated June 21, 2002, the CO noted that while Employer responded in detail about the individuals who were affected by lay offs,

Employer did not relate these lay offs to the specific nature of Employer's business. (AF 6).Essentially, the CO found that Employer had focused quite narrowly, limiting its discussion to the specific location and division of the instant position when discussing individuals affected by layoffs, as opposed to employees "similarly employed" as determined by similarity of skills and knowledge required for performance of the job at issue. Furthermore, the CO noted that the SIS's memorandum merely listed the reasons for these individuals' lay-offs and did not document why they could not perform the main job duties. (AF 6).The CO also observed that Employer refused to identify by name ten employees who were described in the rebuttal as having left employment with Compaq Computers, Inc. Rather, the SIS's memorandum referred to laid-off employees using their first names and last initials and briefly described their job titles and past job experience gleaned from their resumes, as well as stating why they could not qualify for the offered job. (AF 7-10). No additional information regarding these former employees was provided.

The CO also noted that while Employer has related that it has a hiring freeze, it also states that "the company still ... hire[s] and recruit[s] for some highly specialized and technical positions" without indicating what positions are affected. (AF 7-10). Finally, the CO noted that Employer failed to submit information detailing any of Employer's additional efforts to identify qualified individuals who may have been affected by reductions in other departments within the company.

Employer submitted a request for review on August 16, 2002 after its Request for Reconsideration was denied by the CO on July 30, 2002. On appeal, Employer contended that its rebuttal constituted a good faith test of U.S. worker availability. Additionally, Employer cited the memoranda issued by Dale M. Ziegler, Chief of the Division of Foreign Labor Certification for the U.S. Department of Labor, on March 18, 2002 and May 28, 2002, arguing that the CO failed to follow the standard operating procedures set out in those memoranda. Specifically, Employer argues that, although not law, the CO failed to follow the guidelines for requesting documentation which were outlined in the memoranda.

DISCUSSION

Initially, we observe that the RIR regulation at 20 C.F.R. § 656.21(i) provides that a CO "may" reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it has adequately tested the labor market with no success at the prevailing wage and working conditions. Thus, RIRs are granted in the CO's reasonable exercise of discretion. We find that the CO did not abuse that discretion in denying reduction in recruitment in the above-captioned cases.

In all of the cases, Employer's Senior Immigration Specialist limited her discussion to the specific location and division where the position for which labor certification was sought when discussing individuals affected by the layoffs. In its appellate briefs, Employer argues that the NOF failed to provide it with "any guidance regarding a) the time period which the layoff data should encompass, and b) the geographic scope of the layoff and redeployment data needed." In *Miaofu Cao* , 1994-INA-53 (Mar. 14, 1996)(*en banc*), the Board held that:

> Twenty C.F.R. § 656.25 requires that the CO issue a Notice of Findings if certification is not granted. The Notice of Findings must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. . . . Although the NOF must put the employer on notice of why the CO is proposing to deny certification, it is not intended to be a decision and order that makes extensive legal findings and discusses all evidence submitted to the file. The CO is not required to provide a detailed guide to the employer on how to achieve labor certification. The burden is placed on the employer by the statute and regulations to produce enough evidence to support its application. Case law has established that to provide adequate notice, the CO need only identify the section or subsection allegedly violated and the nature of the violation,... inform the employer of the evidence supporting the challenge, ... and provide instructions for rebutting and curing the violation....
>
> Once the CO provides specific guides, he/she must be careful not to mislead the employer into believing that the specific evidence requested is all that is needed to rebut the NOF and for the application for labor certification to be granted. Often it is necessary for the CO to request specific information that he/she has a particular interest in obtaining in light of the deficiencies of the application. However, when the CO requires more than the specific information requested to find that the deficiency has been remedied, he/she must clearly state this fact in the Notice of Findings to avoid any ambiguity.

In the instant case we do not find that the NOF misled Employer into providing inadequate information to rebut the issues raised. Rather, we find that the questions asked in the NOF were clear and unambiguous, and that it was Employer that made the tactical decision to answer the questions narrowly. Moreover, the CO's Final Determination did not raise an issue about the time period covered by the rebuttal response, but rather, found that Employer's rebuttal evidence was too narrowly focused on the precise location of intended employment and on specific qualifying criteria used to explain why the laid-off employees were allegedly not qualified for the positions. We concur with the CO that by explaining how the layoffs impacted the RIR in narrow terms, Employer failed to establish that the job opportunities were clearly open to any qualified U.S. worker as required by 20 C.F.R. § 656.20(c)(8). We do not find that Employer's choice to present the rebuttal narrowly was the fault of the CO or that this is a se in which fairness required the issuance of a supplemental NOF.

We find that a CO may decline to grant an RIR when an employer which has laid off numerous U.S. workers, limits it consideration of qualified workers to those in a localized facility, and does not address the potential availability of workers from other locations. Moreover, we find that a CO may decline to grant an RIR where an employer does not adequately explain why the laid-off U.S. workers could not perform the main job duties. In the instant cases, the job requirements stated in the ETA 750As were extremely broad – essentially various levels of college degrees in computer engineering or related fields for the business analyst position or computer sciences or related fields for the systems/software analyst positions. Employer is a computer company that has laid off or will soon lay off from 2,500 to 5,000 employees. Employer's Senior Immigration Specialist's rebuttal letters, however, analyzed potentially qualified U.S. workers under demanding, detailed criteria in geographically limited locations. Use of such detailed localized criteria indicates that a reduction in recruitment is not appropriate and that traditional supervised recruitment is necessary. *See Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*) (where an applicant's resume indicates a broad range of experience, education, and training, thus raising the reasonable prospect that he met all of the Employer's stated actual requirements, an employer has a duty to make a further inquiry, by interview or other means). Employer's rebuttal also

failed to directly address the CO's reasonable request for documentation on what additional efforts had been made to identify qualified individuals who may have been affected by reductions in other departments within the company. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc) (if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it).

Employer also argues that the CO erred in denying its request in motions for reconsideration that the RIR be reassessed pursuant to memoranda issued by the of the Division of Foreign Labor Certification on March 18 and May 28, 2002 (the "Zeigler Memoranda").[3] Employer asserts that the NOF issued in these cases were "apparently a rubric Region I had used in the past where layoffs at the petitioning employer were of concern." Employer also argues that the information and documentation requested in the NOF were not in accordance with national standards for such NOFs and that "some of the questions posed by the CO had been rendered legally and procedurally irrelevant to the assessment COs are to conduct [under the Ziegler memoranda]. Consequently, Employer argues, it was not given a fair opportunity to satisfy its burden to establish the merits of its RIR application; nonetheless, it provided sufficient information under the Ziegler memoranda standard to warrant certification under RIR. Neither Employer's motion for reconsiderations, nor its appellate briefs, however, state specifically how the CO's processing of the RIRs violated the Ziegler memoranda standards nor do they set forth how its rebuttal evidence would have satisfied the Ziegler memoranda standards as opposed to an allegedly obsolete standard employed by the CO. Apparently, Employer's argument is that the CO used the additional, irrelevant information to deny the RIR.

[3] The Ziegler Memoranda were issued in clarification of GAL 1-97 (Oct. 1, 1996), re-issued as GAL 1-97, Change 1, and published in the Federal Register on May 4, 1999 due to the settlement of unrelated litigation. This GAL was originally issued to promote the RIR process in order to increase efficiency in the permanent labor certification regulations to attempt to deal with increasing workloads with simultaneous declines in staff resources. When GAL 1-97 was published, the U.S. economy was booming and RIRs were an attractive option for employers having difficulty finding adequate supplies of U.S. workers, especially in high-technology industries. When the economy changed in 2001, and certain industries began laying off workers, questions arose from Regional COs about how to analyze RIRs in view of such layoffs, and the Division of Foreign Labor Certification issued the Field Memoranda providing guidance to the Regional COs and State Workforce Agencies. These memoranda are generally referred to in the immigration community as the "Ziegler Memoranda."

However, we have reviewed the questions asked by the CO and the Ziegler memoranda, and we do not find any obvious inconsistencies. Although the Ziegler memoranda suggest a process for questioning an Employer about a layoff, the memoranda do not purport to limit the questions that can be asked by a CO except in regard to inquiries about layoffs to the six months preceding review of the application. The CO may not have followed the exact procedure recommended in the Ziegler memoranda, but he did follow the regulations and raise the issues pertinent to the application at hand. Thus, without more specific information from Employer on how the CO's processing allegedly violated the Ziegler memoranda or GAL 1-97, Change 1, we cannot find that the CO's procedures mandate reversal of the denial of RIRs.[4]

Finally, Employer argues that the CO failed to follow the procedure to remand for regular processing when an RIR is denied, and instead denied the case outright. We concur. The regulation at 20 C.F.R. § 656.21(i)(5) provides that "[u]nless the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer shall return the application to the local (or State) office so that the employer might recruit workers to the extent required in the Certifying Officer's decision, and in the manner required [by the basic certification process]." Thus, the CO's issuance of Final Determinations denying labor certification outright rather than remanding for supervised processing cannot be affirmed.

ORDER

The Certifying Officer's denial of a reduction in recruitment is **AFFIRMED**. The Final Determination denying certification, however, is **REVERSED** and this matter is **REMANDED** with

[4] Because we find that Employer failed to point to any specific substantive or procedural departure from the Zeigler memoranda, we do not reach the issue of whether a departure from a procedural benefit provided for in an internal agency memorandum can invest a party with a claim to relief from an agency decision. We observe, however, that GAL 1-97, GAL 1-97, Change 1, and the "Ziegler Memoranda" in large part merely re-state existing law, are purely internal procedural policy pronouncements, and do not facially conflict with any existing DOL regulations or BALCA case law.

instructions to remand the applications to the State Workforce Agency for regular labor certification processing.

For the panel:

A

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C. 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.